YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by THE YALE LAW JOURNAL COMPANY, INC. P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

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A RELEASE OF ONE JOINT TORT-FEASOR AS A RELEASE OF ALL.

In the recent case of *Dwy v. Connecticut Co.*,[1] the defendant pleaded a formal release given to the Ley Company by the plaintiff. The plaintiff was engaged as an employee of the Ley Company, which corporation was engaged in doing work for and upon the premises of the Connecticut Company. The injury to the plaintiff was caused by electricity with which the structure upon which he was working had become charged. The court held that as the release included a reservation of the right to sue any other party or parties for the same injury, and nowhere recognized the consideration received to be complete satisfaction, such release should be given the effect of a covenant not to sue in order to comply with the intent of the parties, and that therefore the Connecticut Co., though a joint-feasor with the Ley Company, was not also released.

[1] 92 Atl. (Conn.) 883.

The opinion of the court contains an exhaustive review of the authorities on this question. As therein brought out, there are two groups of cases: The one holds that the technical language of the release prevails, and that a reservation of the right to sue others of the joint tort-feasors or other indications that full satisfaction has not been received, being repugnant to the legal effect of a release, must be ignored; the other disregards the technical form of the release, and holds that one must look to the true intent and meaning of the parties, and that such language, being repugnant to the idea of a technical release, prevents it from operating as such and renders it a covenant not to sue. This second group is the more reasonable and equitable, and more in accord with the modern theory that mere technicalities should not prevent the true intention of parties to an instrument from being fulfilled.

It is submitted that there are cases in which such a reservation is repugnant, not only to the technical language, but also to the true intent of the parties, and its effect should be nullified. This occurs where the release is given to that one of two joint tort-feasors against whom the other tort-feasor has a right of contribution or indemnity. Manifestly, the true intent of the parties is to render the releasee immune from all further claims on the part of the releasor arising out of the injury in question, whether such claims be directly or indirectly asserted. If, therefore, we construe the release as a covenant not to sue, and allow suit to be brought against the other tort-feasor, the latter can turn to the released party and demand contribution. Thus the effect, and the intended effect of the release, would be frustrated. Generally this would not occur. "There is no contribution between joint tort-feasors." But this general rule does not apply in certain classes of cases.

The rule has been held inoperative in order that the ultimate loss may be visited upon the principal wrong-doer, where one less culpable, although legally liable to third persons, may escape the payment of damages by putting the ultimate loss upon the one principally responsible for the injury done.[2] This is illustrated in numerous cases where a municipal corporation has been allowed to recover over the amount of damages for which it has been held liable in consequence of a defective street, occasioned

[2] *Union Stockyards Co. v. Chicago &c. R. R. Co.*, 196 U. S. 217.

by the neglect or failure of another to perform his legal duty.[3] Likewise where the plaintiff was legally bound to keep a sidewalk reasonably safe, and the defendant obstructed it whereby a third party was injured, it was held that they were not in *pari delicto*—that the plaintiff's neglect to keep the sidewalk safe did not make the plaintiff a joint wrong-doer with the defendant, in any such sense as to prevent the plaintiff from recovering over of the defendant whatever damages he had been forced to pay the injured party.[4] So where a gas company negligently performed its duty to keep its pipes in a safe condition, and thereby damage occurred, it was allowed to recover over of a traction company, whose negligent excavation had caused the leak.[5] In these cases both parties have been guilty of a tort to third parties and as to them are joint-feasors. But the liability of one has arisen from the positive acts or omissions of the other, and not by its own active participation or knowledge and assent. As between themselves, the active wrong-doer stands in the relation of an indemnitor to the person who has been held legally liable therefor.[6] "The liability which results from the mere omission of a legal duty is to be distinguished for the purpose of this case (*i. e.*, to recover indemnity) from that which results from personal participation in an affirmative act of negligence, or from a physical connection with an act of omission by knowledge of, or acquiescence in it, on the part of the defendant."[7]

A distinction is also made between the negligence of one party which brings about a condition, and the negligence of another party in not recognizing and acting upon such condition. As to an injured party, they are joint tort-feasors, but as between themselves the former may recover over of the latter. As between the two negligent parties, the negligence of the active perpetrator of the wrong is the proximate cause of the injury to the party whose negligence did no more than to produce the

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[3] *City of Bowling Green v. Bowling Green Gaslight Co.*, 112 S. W. (Ky.) 917; *Washington Gas Co. v. District of Columbia*, 161 U. S. 316; *Hamden v. N. H. and Northampton Co.*, 27 Conn. 158; *Baltimore & O. R. Co. v. County Com'rs*, 77 Atl. (Md.) 930; Dillon on Municipal Corporations, §1035.

[4] *Old Colony Railroad v. Slavens*, 148 Mass. 363. See also *Churchill v. Holt*, 127 Mass. 165; *Gray v. Boston Gas Light Co.*, 114 Mass. 149.

[5] *Phila. Co. v. Traction Co. et al.*, 165 Pa. 456.

[6] *Scott v. Curtis*, 195 N. Y. 424.

[7] *Phoenix Bridge Co. v. Creem*, 92 N. Y. Supp. 855.

condition.[8] In New Hampshire, this question of whether, as between the joint tort-feasors, the negligence of the one seeking indemnity may be regarded as a remote cause or condition of the injury, and the negligence of the other as the proximate cause thereof, has been determined by the application of the doctrine of last clear chance.[9]

A master who has been held liable for the negligent acts of his servant upon the doctrine of *respondeat superior* may recover indemnity from the servant for whose negligence he has responded.[10] But where the master's own negligence has concurred with that of his servant, no right of contribution exists.[11] So too, an employer may recover of his contractor, by whose negligence he has, without fault of his own, been compelled to pay damages.[12] "In negligent cases based not upon wilful wrongdoing, but growing out of legal duties and obligations, a clear distinction must be drawn between the liability of the party primarily negligent and that of one secondarily so to the extent of being liable to a third party injured. In such a case, it is well settled that the second party, while he may not escape liability to the third party injured, may hold the first party, primarily negligent, for indemnity."[13]

In the principal case it does not appear from the statement of facts whether the negligence was that of the Connecticut Co., or was primarily that of the Ley Co., being imputed to the Connecticut Co. Should it appear that the Ley Co., was primarily negligent, a release given to them should operate to discharge the Connecticut Co., despite the reservation of the right to sue, as, in accordance with the above cases, the Connecticut Co., would, if sued, be entitled to claim indemnity from the Ley Co.

Finally, though we construe this release to be a covenant not to sue, the fact remains that it is in reality a release. What the court does is to abrogate the well-settled rule that a release for a consideration of one of several joint tort-feasors is a release

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[8] *Austin El. Ry. Co. v. Faust*, 133 S. W. (Tex.) 449.

[9] *Nashua Iron & Steel Co. v. Worcester & N. R. Co.*, 62 N. H. 159; *Boston & M. R. Co. v. Brackett*, 71 N. H. 494.

[10] *Smith v. Foran*, 43 Conn. 244; *G. T. Ry. Co. v. Latham*, 63 Me. 177.

[11] *Central Ry. Co. v. Macon Ry. & Light Co.*, 9 Ga. App. 632.

[12] *Galveston, H. & S. A. Ry. Co. v. Pigott*, 116 S. W. (Tex.) 841; *Maxwell, S. & Co. v. L. & N. R. R. Co.*, 1 Tenn. Ch. 8. See also *Eaton & Prince Co. v. Trust Co.*, 100 S. W. (Mo.) 551.

[13] *Pa. Steel Co. v. Wash. & Berkeley Bridge Co.*, 194 Fed. 1011.

of all. The concurring opinion of Judge Wheeler recognizes that this is in fact judicial legislation, disguised though it be by the mantle of "construction." To quote from his opinion: "This rule of law (that a release of one is a release of all) was established by the courts because it then seemed to bring about what should be done according to the then established judgment of society. . . . Time has proved that the rule is wrong in principle and in its operation promotes injustice. . . . It is better that the rule should be changed, rather than modified by exceptions which are sustained by a forced construction of men's agreements. . . . That court best serves the law which discards the old rule when it finds that another rule of law represents what should be according to the settled and established judgment of society. . . . Change of this character should not be left to the Legislature."

That this open assertion would stagger the opponents of judicial legislation is without question. The power of the judges to make law has been a source of much controversy. The statements of Lord Esher that "there is in fact no such thing as judge-made law,"[14] that "once conclude that such was always the law, and it follows that it is the common law, that law would not and cannot be altered by mere judicial decision but only by Act of Parliament,"[15] and the statement of Brett that "the judges cannot make new law by new decisions, they do not assume a power of that kind; they only endeavor to declare what the common law is and has been from the time it first existed"[16] have long since been exploded. Such statements were termed by Austin, "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing from eternity."[17] That the common law is in fact almost entirely of judicial origin is now well recognized.[18] The controversy at the present day is as to whether the judges should continue to legislate, or whether they should confine themselves entirely to the interpretation and application of the law as they find it, and leave the making of new law and the abrogation of outgrown law to the legislature.

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[14] In *Willis v. Bradley*, 2 Q. B. D. 324.

[15] In *Cockrane v. Moore*, 25 Q. B. D. 74.

[16] In *Munster v. Lamb*, 11 Q. B. D. 599.

[17] Austin's "Jurisprudence," p. 655. See also Street's "Foundations of Legal Liability," p. 498.

[18] *Tuttle v. Buck*, 107 Minn. 145; Pollock's "First Book of Jurisprudence," p. 240; *Allen v. Jackson*, 1 Ch. 399 (1875); McKelvey on Evidence, §40; Pomeroy's "Equity Jurisprudence," §69.

No man, perhaps, has denounced judge-made law so severely and unsparingly as Bentham.[19] Such statements as those of Lord Esher he branded as "a wilful falsehood having for its object the stealing of legislative power by and for hands which could not, or durst not, openly claim it." There was nothing he so detested as judge-made law, and he would abrogate it, root and branch, by a declaration that there should be no enforceable rules outside the code. "One of the fundamental doctrines of American constitutional jurisprudence is that the exercise of the executive, legislative, and judicial powers is to be vested in separate and independent organs of government. . . . The judicial department cannot assume the performance of functions essentially legislative. Although the judiciary has endeavored to avoid the assumption of legislative power, under the English system of judicial interpretation, in some cases, the inevitable result is judicial legislation."[20]

Should the judiciary, as advocated by Judge Wheeler, broaden the statute,[20a] which provides that the discharge of one of several joint debtors shall not discharge the others, so as to change the rule as to tort obligations? This kind of judicial legislation has been rightly criticized. Mr. Justice Harlan in the Standard Oil case said, "I am impelled to say, that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction." The courts should not attempt to change the law as laid down by the legislature but should leave such changes to the body which enacted the law.

The rule as to releases was laid down as part of the common law—the work of the judiciary. It was evolved by them as being the then expression of the people's will. If the legislature fails to see that it is now outgrown and should be changed, the judiciary should take it upon itself to change it. Nor should it resort to the cloak of "construction" or the equally obnoxious "broadening" of the statutes. That such an attitude is necessary is exemplified in the establishment and growth of the courts of equity. To-day, as then, judicial legislation is needed to prevent the law from becoming antiquated.

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[19] See Carter, Law, its Origin, Growth, and Function, pp. 180, 205.

[20] "The Balance and Delegation of Governmental Powers," by E. D. Martin in The American Law Review, Vol. 27, number 5, p. 715.

[20a] General Statutes, §655.

We must recognize that the law is in a constant state of progress. As the ethical and moral ideals of the nation change, so must the laws, the expression of these ideals, change. The judges, by their training and by their constant contact with the law are best fitted to give expression and effect to the people's will. They are far less liable than the legislature to be swayed by political influence, and far less liable to be misled by the press and the biased and extreme views of agitators.[21] "The study of justice leads to the love of justice, and they are the first to recognize and sanction the improving customs of life."[22] "Nor is there any danger in allowing them that power which they have in fact exercised, to make up for the negligence or incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature."[23]

In making these changes the judges should move slowly. Radical or abrupt changes should be left to the legislature. But the judges should endeavor to keep the law abreast of the times. When a rule of the common law is found to be antiquated, when it no longer brings about justice as conceived and desired by the people, then the judges, in the absence of help from the legislature, should discard the rule and formulate one more in accordance with the needs of the present hour. It is only in this way that respect and reverence for the law can be maintained, for the people cannot respect or reverence that which does not represent the ethical and moral standards of their age.[24]

LIABILITY OF MUNICIPAL CORPORATIONS AND QUASI CORPORATIONS FOR INJURIES RESULTING FROM NEGLIGENCE IN MAINTAINING PUBLIC PARKS.[1]

There is a considerable conflict of authority on this topic.[2] According to the somewhat strict view obtaining in New Eng-

[21] "Judges as Law Makers," by C. T. Bonaparte, 23 Green Bag, 507.

[22] Carter, Law, its Origin, Growth, and Function, pp. 324, 335.

[23] Austin, Jurisprudence, p. 224.

[24] See "The Law and the Judges," by A. L. Corbin, Yale Review, January, 1914.

[1] See comment on the liability of a municipal corporation for negligence in the administration of its duties in 20 YALE LAW JOURNAL, 571.

[2] 25 Harv. Law Rev. 568.